6 February 1974

MEMORANDUM RE: H.R. 12004, A Bill to Provide for Classification and Declassification of Defense Information

1. H.R. 12004 (copy at Tab A), which would amend the Freedom of Information Act by establishing a statutory system for classifying defense information, would damage the government's intelligence operations severely. For an understanding of the bill, a brief explanation of the current law, into which the bill would fit, would be useful.

2. The existing system was established by Executive Order 11652, which became effective 1 June 1972 and replaced an Executive Order which, with amendments, had existed since 1953. The 1953 Order, in turn, superseded other orders and departmental regulations which came into existence during World War II. The Freedom of Information Act, now nearly seven years old (July 4, 1967), provides that upon request by anyone for an identified document, the department concerned must furnish it, unless it falls within one or more of nine specified exemption categories. One such category is matters that are "specifically required by Executive order to be kept secret in the interest of national defense or foreign policy" (hereinafter referred to as "Exemption No. 1").

3. One of the outstanding features of the bill is that it seriously weakens the ability of the President and the departments to protect security information. The reasons for this are several. First, the bill obviously contemplates that E. O. 11652 would be rescinded and it probably would be. (If it were not, there would be both a statutory classification system and one established by executive order. The necessity for the departments to comply with both and the frustrations to the public in contending with both, virtually dictate rescission.) If E. O. 11652 is revoked, the protection of Exemption No. 1 to the Freedom of Information Act (FOI) dies with it. In that event, even a classified document could be withheld from a requestor only if the amendment to FOI which the bill would enact authorizes withholding. It is not at all clear that it does. The bill does not specifically so provide and it does not add a new exemption. It is arguable that a statutorily established classification system intends the authority to withhold but the language is dangerously vague in this regard.

4. A second serious deficiency is found in the designation of the information which may be classified and protected, namely "national defense information." This contrasts with the corresponding provision of E. O. 11652. There the term is "national security information," defined as information involving the "national defense or foreign relations of the United States." Many intelligence operations and activities likely would be acceptable to all as properly following within the narrower term "national defense information." But probably some, and perhaps many, would not and the courts might so hold.

5. Still a third defect--and perhaps the most serious--is the requirement for automatic declassification. All CONFIDENTIAL information declassifies in one year, all SECRET, in two. All TOP SECRET declassifies in three years unless it falls within one of four specified categories, several of which specifically or otherwise cover intelligence activities. 1/ But even information in these categories may be declassified by a Classification Review Committee, which the bill establishes. Procedures are prescribed for such actions by the Classification Review Committee which include authority for the CRC to take such action even if the President, in writing, justifies classification, "based upon national defense interests of the United States of the highest importance." Under the Executive Order information declassifies in 10 years, with certain exceptions which also include information concerning intelligence, and the exceptions are not limited to TOP SECRET information.

6. Still another difficulty in the bill, to an intelligence organization, is the requirement that agencies compile lists of persons authorized to classify. The lists must include names and addresses. They must be furnished to the CRC quarterly and, upon request, to any committee of Congress and to the Comptroller General. The corresponding provision in the Executive Order does not call for submission to Congressional committees or the Comptroller General. With respect to the listing of names the Executive Order provides that in "cases where lists of the names of officials having classification authority might disclose intelligence information" the department "shall establish some other record by which such officials can readily be identified."

1/ (A) is specifically exempted from disclosure by statute;
(B) pertains to cryptographic systems;
(C) would disclose intelligence sources or methods; or
(D) would disclose a defense plan, project, or other specific defense matter, the continuing protection of which is of vital importance to the United States and the unauthorized disclosure of which could cause exceptionally grave damage to the national defense of the United States.

7. The bill makes no provision to protect information furnished by a foreign government beyond the one-, two-, or three-year timetable in which it fits (i.e.; C, S, or TS).

8. The Classification Review Committee is to have a number of powers, additional to that of declassifying information. It is to

a. regulate concerning protection of and access to classified information;

b. prescribe that "no individual may withhold or authorize withholding" information from Congress; and

c. investigate and appraise the activities of the agencies under the bill.

9. The CRC is empowered to order that information be made available to Congress or the Comptroller General, under procedures prescribed by the bill. Upon appeal of a CRC decision to the United States Court of Appeals for the District of Columbia, that court shall uphold the decision "if there is substantial evidence on the record to sustain that decision," not just a preponderance of evidence. Since the parties may submit evidence to the CRC, this provision suggests the likelihood that few CRC decisions will be reversed or set aside.

10. The impact of the bill on the Director's statutory responsibility to protect intelligence sources and methods from unauthorized disclosure is a special problem. Absent legislative history to the contrary, the bill is subject to the interpretation that to the extent of any conflict between the authority of the CRC and that of the Director, the former is to prevail.

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Associate General Counsel

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Attachment

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Except with respect to records involving matters under subsection (b) relating to the responsibility for protecting intelligence sources and methods from unauthorized disclosure under sections 403 and 403(g) of Title 50, United States Code.

ly available to an individual, and otherwise to implement the provisions of this section.

"(c) This section shall not apply to records that are—

"(1) specifically required by Executive order to be kept secret in the interest of the national security;

"(2) investigatory files compiled for law enforcement purposes, except to the extent that such records have been maintained for a longer period than reasonably necessary to commence prosecution or other action or to the extent ayallable law law to a party other than an agency; ahd

"(3) interagency or intragency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

"(d) The President shall report to Congress before January 30 of each year on an agency-by-agency basis the number of records and the number of investigatory files which were exempted from the application of this section by reason of clauses (1) and (2) of subsection (d) during the immediately proceding calendar year.

"(e) This section shall not be held or considered to permit the disclosure of the identity of any person who has furnished information contained in any record subject to this section.

"(f) If any provision of this section or the application of such provision to any person or circumstance shall be held invalid, the validity of the remainder of this section and the applicability of such provision to other persons or circumstances shall not be affected thereby."

(b) The table of sections of subchapter II of chapter 5 of title 5, United States Code, is amended by inserting:

"552a. Individual records."

immediately below:

"552. Public information; agency rules; opinions, orders, records and proproceedings.".

SEC. 2. (a) There is established a Board to be known as the Federal Privacy Board (hereinafter referred to as the "Board").

(b) The Board shall consider complaints from any individual that one or more of the requirements of section 552(a) of title 5, United States Code, have not been met, with respect to the records specified in such section, by the responsible agency. The Board upon finding that one or more of the requirements have not been met, shall issue a final order directing the agency to comply with such requirement or requirements, and this order shall be binding on the parties to such a dispute.

(c) The Board shall consist of seven members, each serving for a term of two years, four of whom shall constitute a quorum. Three members shall be appointed by the Speaker of the House, three by the President pro tempore of the Senate, and one by the President. No more than two of the members appointed by the Speaker of the House shall be of the same political party. No more than two of the members appointed by the President pro tempore of the Senate shall be of the same political party. The member appointed by the President shall be from the public at large. Any vacancy in the Board shall be filled in the same manner the original appointment was made.

(d) Members of the Board shall be entitled to receive $100 each day during which they are engaged in the performance of the business of the Board, including traveltime, but members who are full-time officers or employees of the United States shall receive no additional compensation on account of their services as members.

(e) The Chairman of the Board shall be elected by the Board every year, and the Board shall meet not less frequently than bimonthly.

(f) The Board shall appoint and fix the compensation of such personnel as are necessary to the carrying out of its duties.

(g) The Board shall hold hearings in order to make findings upon each complaint, unless there are reasonable grounds to believe that the complaint is frivolous or irrelevant. The Board may examine such evidence as it deems useful, and shall establish such rules and procedures as it determines are most apt to the purposes of this section, including rules insuring the exhaustion of administrative remedies in the appropriate agency.

SEC. 3. (a) Section 2511(2) of title 18, United States Code, is amended—

(1) by striking out in paragraph (c) "(c) It" and inserting in lieu thereof "(c) (i) Subject to the provisions of clause (iii), it"; and

(2) by striking out in paragraph (d) "(d) It" and inserting in lieu thereof "(ii) Subject to the provisions of clause (iii), it".

(b) Section 2511(2)(c) of such title 18 is further amended by adding at the end thereof the following new clause:

"(iii) It shall not be unlawful under this chapter for a person to intercept a telephone conversation by means of a recording device where such person is a party to the conversation, has given adequate notice to all parties to the conversation that the conversation is being recorded, and uses an automatic tone warning device which automatically produces an audible distant signal that is repeated at regular intervals during the course of the telephone conversation when the recording device is in use. The Federal Communications Commission shall prescribe by regulation the characteristics of an automatic tone warning device that may be used in connection with the authorized interception of telephone conversations."

SEC. 4. The amendments made by this Act shall become effective on the ninetieth day following the date of enactment of this Act.

By Mr. KENNEDY:

S. 2543. A bill to amend section 552 of title 5, United States Code, commonly known as the Freedom of Information Act. Referred to the Committee on the Judiciary.

FREEDOM OF INFORMATION ACT AMENDMENTS

Mr. KENNEDY. Mr. President, over half a century ago President Woodrow Wilson expressed the hope for a new era of international diplomacy in which agreements among nations would be "open covenants, openly arrived at." President Wilson believed that an end to secrecy in international relations would help to ensure that agreements among nations would in fact be agreements that served the interests of the people of those nations, and not only the interests of their governments.

The principle for which President Wilson stood may still be considered by many to be impractical in the field of international relations. But the principle that government should be conducted publicly, in the public interest, is not only practical in the field of domestic affairs—it is, as recent events in this country have demonstrated, necessary to preserve a vital democracy and government for the people.

We should keep in mind that it does not take marching armies to end republics. Superior firepower may preserve tyrannies, but it is not necessary to create them. If the people of a democratic nation do not know what decisions their [illegible] basis on which those decisions are being made, then their rights as a free people may gradually slip away, silently stolen when decisions which affect their lives are made under the cover of secrecy. Secret government too easily advances narrow interests at the expense of the public interest. We have seen this with respect to military cost overruns, Watergate, the Russian wheat deal, and secret political contributions. Public government is the best insurance we have that government is being conducted in the public interest.

The first amendment recognizes this principle. That amendment is premised on the public's right to information as being basic to maintaining our popular form of government. The Freedom of Information Act recognized this principle too. Enacted on July 4, 1966, the Act was intended to open the processes of government to public inspection and to ensure that the actions of bureaucracies were easily subject to public scrutiny.

The Freedom of Information Act—FOIA—was designed to reverse earlier law practice under which government officials had considered themselves free to withhold information from the public under any subjective standard that could be articulated for the occasion. The FOIA not only established the general rule that all information in Government files must be made public, with narrowly defined exceptions limiting what may be withheld from public disclosure; for the first time it also provided a remedy against the unlawful withholding of information: The person improperly refused information by the Government could take his case to court.

Although this act was hailed by President Johnson in 1966 as springing from the essential principle that "a democracy works best when the people have all the information that the security of the Nation permits," many observers recognized at the time the difficulties in administering and interpreting the new law. Courts have recognized deficiencies in the legislation, and testimony this year before the Senate Subcommittee on Administrative Practice and Procedure on various proposals to amend the Freedom of Information Act pointed out clearly many areas that require congressional action to insure agency compliance with the law. Witnesses suggested "that the act has become a 'Freedom from Information' law, and that the curtains of secrecy still remain tightly drawn around the business of our Government."

While the problems with administering the provisions of the Fredom of Information Act have long been recognized, recent discussion has centered around the appropriate remedial action by Congress. Last winter, Senator MUSKIE introduced S. 1142, which proposed a number of procedural and substantive changes in the law. This bill was a companion bill to H.R. 5425, introduced by Congressman MOORHEAD, who had developed legislation after extensive hearings by his House subcommittee.

During this past spring three Senate subcommittees joined together to take an intensive look at various aspects of Gov-

ernment secrecy; hearings focused on executive privilege and the classification system as well as freedom of information. Of the 11 days of joint hearings, 5 were devoted almost exclusively to Freedom of Information Act issues. Witnesses representing the media, public interest groups, and Government agencies joined lawyers and congressional witnesses in analyzing the shortcomings of the present law and in proposing varying solutions. The bill that I am introducing today reflects the results of our public hearings and staff analysis of the agency practices and the reported decisions under the Freedom of Information Act. Let me describe in some detail the provisions of this bill.

Section 1 contains various procedural reforms to facilitate citizen access to Government records and to inhibit bureaucratic noncompliance with the mandates of the FOIA.

AMENDMENT TO SUBSECTION (a)(1) OF THE FOIA
PUBLICATION OF INDICES

Subsection 1(b) is designed to provide greater accessibility to each agency's index, which provides identifying information for the public as to matters issued, adopted or promulgated by the agency. I do not believe that this requirement will be either overly burdensome or expensive, but it will provide the public—especially through institutions and libraries—with more readily available access to what its Government is doing. Some agencies, like the Federal Communications Commission, are already in compliance with this requirement and have experienced no apparent problems in this regard.

Because of possible problems with interpreting a requirement that such indices be "currently" published, the new publication requirement would require only a "quarterly or more frequently" publication of these indices—a modification adopted from a suggestion to the subcommittee by the Federal Power Commission. Publication by a commercial service, like the Commerce Clearing House or the Bureau of National Affairs, would fulfill the requirements of this section. Duplicative publication would serve no useful purpose and is certainly not intended by the provision, but in instances where agencies rely on commercial services, those agencies would be expected to maintain those commercial services at its offices and to make them available for public inspection.

AMENDMENTS TO SUBSECTION (a)(3)

Subsection 1(b) of the proposed bill contains a number of amendments to subsection (a)(3) of the FOIA—5 United States Code, section 553(a)(3). In the course of amending this subsection, I have divided (a)(3) into two parts, with the elements of each place in separate subparts. I have done this not only for clarity, but to reflect what I believe was the original intent of Congress in enacting (a)(3)—that the judicial review provisions apply to requests for information under (a)(1) and (a)(2) of section 552, as well as under subsection (b). On occasion the Department of Justice has argued that judicial review of a denial of information requested under subsections (a)(1) and (a)(2) was not available under the FOIA. Courts have uniformly rejected this argument, and the redrafting of subsection (a)(3) should lay this issue to rest.

IDENTIFIABLE RECORDS

Presently the provisions of the FOIA are predicated upon a "request for identifiable records." This would be changed to refer simply to a "request for records which reasonably describes such records." This change again generally reflects what I believe to be the intention of the original drafters of the Freedom of Information Act. The Senate report, in explaining the term "identifiable," said:

> Records must be identifiable by the person requesting them, i.e., a reasonable description enabling the government employees to locate the requested records.

Although many agencies view this as the presently operative interpretation of the "identifiable" requirement, nonetheless cases continued to arise where courts feel called upon to chide the Government for attempting to use the requirement as an excuse for withholding documents. This proposal in effect incorporates the liberal standard for identification that Congress intended and that courts have adopted when dealing with this issue, and thus would create no new problems of interpretation.

SEARCH AND COPY FEES

The Director of the Office of Management and Budget would be required under these amendments to promulgate regulations setting a uniform schedule of fees applicable to all agencies. Public witnesses at our hearings discussed a number of problems with present use and abuse of charges for access on an agency by agency basis and recommended a uniform approach.

The Administrative Conference of the United States, in a formal recommendation relating to the FOIA, proposed that a fair and equitable fee schedule be established by each agency, and the Office of Management and Budget was prompted by this recommendation to initiate a study of the possibility of uniform charges under the Freedom of Information Act. This study was dropped before completion and no further action on this matter has been undertaken, even though the Administrative Conference study found that copying charges ran from 5 cents a page at USDA to $1 a page at the Selective Service System, while clerical search charges varied from $3 an hour at the Veterans' Administration to $7 an hour at the Renegotiation Board. Little wonder OMB backed down after an initial attempt to make order out of this chaos.

This amendment proposes that the fee schedule to be set by OMB shall not "exceed the average actual direct cost for all agencies of duplication or search." This should avoid the problem of agencies using fees as bariers to the disclosure of information which otherwise should be available. While it is recognized that on some occasions and with some agencies a uniform standard will result in the charging of fees lees than the total cost of search or sanitization or copying allocable to a specific request, a member of the public should not suffer merely because he deals with an agency that is unusually inefficient, that overly commingles exempt with nonexempt materials, that uses higher-salaried personnel for searching or copying, or that has a higher general overhead allocated to its information-disseminating functions.

Finally, borrowing from regulations in effect at the Departments of Transportation and Justice, the amendment allows documents to be furnished without charge or at a reduced charge where the public interest is best served thereby. In addition to setting the general rules, the section sets forth certain specific criteria for determining when the charge should be waived or reduced.

VENUE

Two technical amendments to the present FOIA provisions would establish jurisdiction—concurrent with that already set out in the statute "in the district in which the complainant resides, or has his principle place of business, or in which the agency records are situated"—in the District of Columbia, and would provide for expedition of cases on appeal as well as in the trial court. As to this first provision, a number of present Federal statutes authorize venue in suits against Federal agencies to be in the District of Columbia. Since, in FOIA cases as in other areas of administrative law, the D.C. Federal courts have built up substantial expertise, a complainant should be able to utilize this forum. There would only be added convenience for, and not added burdens to, the Government with such cases brought in D.C. As to expedition on appeal, the FOIA presently provides that proceedings brought under the act in the district court shall "take precedence on the docket" and "be expedited in every way." While the District of Columbia Court of Appeals has extrapolated this mandate and given appeals of FOIA cases precedence, other circuits have not yet followed suit. This amendment would make this practice uniform throughout the Federal Courts of Appeals.

IN CAMERA INSPECTION AND DE NOVO REVIEW

Presently when most FOIA cases reach the Federal district courts, the judges have authority to examine the requested documents in order to ascertain the propriety of agency withholding. This procedure has not, however, been held to apply to records withheld under the first exemption of the act—section 552(b)(1). In Environmental Protection Agency against Mink, involving Congresswoman PATSY MINK'S attempt to obtain from EPA documents relating to the projected effect of the underground atomic test at Amchitka, the Supreme Court ruled that in all cases except where the documents are claimed to be specifically required Executive order to be kept secret in the interest of national security and foreign policy, de novo review by the district court—provided for in the FOIA—allows an in camera inspection of the records requested. In that inspection the court is to determine whether claimed exemptions apply in fact and whether non-

exempt materials can be severed from exempt materials and be released. The proposed amendment would write this standard into the act for all situations where withholding of documents is challenged in court. I will discuss below in greater detail the requirements and implications of judicial review where the Government relies on exemption (b)(1) for withholding documents—one of the issues addressed by the Supreme Court in Mink. But the Government in at least two cases has also taken the position that the seventh exemption—subsection (b)(7) relating to disclosure of "investigatory files" represents a blanket exemption where in camera inspection is unwarranted and inappropriate.

S. 1142 had provided that in camera examination of disputed records be mandatory in every case. Clearly there are instances where a judge can rule without such examination, and I would therefore leave to the court the discretion when to require submission of records for in camera inspection.

Some of our witnesses this spring pointed out the inherent disadvantage to one party to a lawsuit where the court is examining in camera materials submitted by the other party.

This past summer the Court of Appeals of the District of Columbia observed that in cases where in camera examination is warranted—

It is anomalous but obviously inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information. Obviously the party seeking disclosure cannot know the precise contents of the documents sought. . . . In a very real sense, only one side to the controversy (the side opposing disclosure) is in a position confidently to make statements categorizing information. . . .

Thus, said the court:

The present method of resolving FOIA disputes actually encourages the Government to content that large masses of information are exempt, when in fact part of the information should be disclosed.

The court then ordered that, in those situations calling for in camera inspection, the Government must provide a detailed analysis of the withheld documents and the justifications for withholding them, and should formulate a system of itemizing and indexing those documents that would correlate statements made in the Government's refusal justification with the actual portions of each document. This approach, with use of a special master where voluminous material is involved, is intended by the court to "sharply stimulate what must be, in the final analysis the simplest and most effective solution—for agencies voluntarily to disclose as much information as possible and to create internal procedures that will assure that disclosable information can be easily separated from that which is exempt."

While this bill does not detail procedures to be used to facilitate in camera inspection, those established in the case just discussed are in keeping with the FOIA's legislative [illegible] should be applied in appropriate cases in the future.

ATTORNEYS' FEES AND COSTS

My proposal to amend the FOIA contains the provision that courts may assess reasonable attorneys' fees and other litigation costs against the United States in cases where the complainant has substantially prevailed. This was seen by many witnesses as crucial to effectuating the original congressional intent that judicial review be available to reverse agency refusals to adhere strictly to the act's mandates. Too often the barriers that court costs and attorneys' fees present to the average requester of information are insurmountable, allowing the Government to escape completely compliance with the law.

Hearings currently underway by another subcommittee of the Judiciary Committee have been clearly pointing up the extent to which attorneys' fees can be barriers to implementation of national policies expressed clearly by Congress in legislation. This amendment would allow appropriate room for judicial discretion to determine the reasonableness of the fees requested. Courts would continue to use the same criteria presently applied in determining attorneys' fees awards under present judicial standards. And of course, attorneys' fees and costs could be recovered only where the plaintiff substantially prevails in his litigation against the Government.

CIVIL PENALTY FOR VIOLATION

There are numerous provisions in Federal law containing sanctions against unauthorized disclosure of certain kinds of information to the public. For example, 18 United States Code section 1905 makes it a Federal crime for Government employees to reveal trade secrets. Numerous other laws and regulations prohibit disclosure of financial or medical information, tax returns and various applications for Government assistance.

But nowhere in the law are there sanctions for Government employees who violate the law by withholding information. My bill includes provisions for a procedure for judicial determination whether the Federal employee responsible for wrongfully withholding information from the public has acted without a reasonable basis in law. If the court so determines, it is authorized to assess a civil monetary fine against the individual or individuals found responsible for the withholding. Provisions are included elsewhere in the bill or identifying those individuals involved in the decisionmaking process on FOIA denials. A number of States have adopted similar sanctions in their public information statutes, although many State laws make violations of freedom of information provisions a misdemeanor.

One witness before our subcommittee with broad experience on Freedom of Information Act issues put it thusly:

One major reason the bureaucratic attitude "when in doubt, withhold" is so entrenched is that it is rooted in legal self-protection. And official is held individually accountable under criminal statutes for releasing trade secrets or other confidential commercial information but faces no sanction at all if he illegally withholds information from the public.

In one case brought to the subcommittee's attention by another witness, an OEO employee was suspended because he had released allegedly confidential information. Later OEO released that same information when sued under the Freedom of Information Act. But it still refused to lift its suspension of the employee.

Finally, proposed Criminal Code revisions would render a Federal employee criminally liable if "in violation of his obligation as a public servant under a statute or rule, regulation or other such statute, he knowingly discloses any information which he has acquired as a public servant." I personally am opposed to such a broad prohibition, and my amendment would indicate clearly the commitment to openness, not secrecy, on the part of every officer and employee in the Federal Government.

ANSWER TIME IN COURT

One proposed amendment would give the Government 20 days to answer a complaint in court challenging the withholding of information contrary to the FOIA. The act initially recognized the importance of time to many members of the public seeking information, and established a priority place on court dockets, requiring that FOIA litigation take precedent before the courts and be expedited in every way. In normal litigation in the Federal courts, the defendant is given 20 days to answer to the complaint. As reflected in the hearing record, many of the answers in FOIA suits are peremptory. Yet often the Government obtains extensions beyond the present 60-day period.

Before any FOIA case reaches court, the agency from whom the records were first requested already would have been given time—both from the initial request and on appeal—to determine the legal and practical implications of its withholding. Furthermore, under an order presently in effect by Attorney General Richardson, the Justice Department will be consulted before any final denial of a request for information is issued by any agency. Thus the 20 day requirement should not be an undue burden on the government. In special circumstances, the court can direct, for good cause, an extension of time beyond 20 days for the Government's answer.

ADMINISTRATIVE DEADLINES

The legislation I am proposing today would establish time deadlines for the administrative handling of requests for information under the FOIA. It would require the agency to determine within 15 days after the receipt of any request whether to comply with that request, and would give the agency an additional 15 days to respond to an appeal of its initial denial. With each notification of denial to the requester, the agency must clearly outline the subsequent steps that may be taken to challenge that denial.

The administrative conference study, testimony by government witnesses, and the pattern set by present agency regulations suggest flexibility, even where specific time deadlines are set, for responding to requests for information. Statements were made in the hearings, in fact, that this matter be left entirely to each agency's regulations, so that it

could determine the flexibility and discretion it needed to deal with requests.

Witnesses from the public sector, however, uniformly decryed delays in agency responses to requests as being of epidemic proportion, often tending under the circumstances to be tantamount to refusal of the information. Media representatives especially urged stiff deadlines on agency responses; agencies realized too often that a delay in responding to a request for records by the press can often moot the story being investigated and will ultimately blunt a reporter's desire to utilize the act at all.

As to the argument that agencies can by regulation best govern their own performance in this area, one example should suffice. On August 2, 1972, a request was made to the Department of Justice for certain business review letters issued by the Antitrust Division. The initial denial was dated November 24, 1973—3 months after the initial request—from which an appeal was taken to the Attorney General on December 6. Although the requestor filed suit February 21, 1973, the final agency response was not forthcoming until April 19. That response denied access to the documents under longstanding departmental policy. Thus, a period of over 4 months elapsed before the administrative appeal was decided. And the irony of this case was that in the interim the Department proposed regulations effective March 1 under which the responsible agency official will respond to any initial request for information in 10 days, and under which the "Attorney General will act upon the appeal within 20 working days." Obviously, in advocating that the problems of FOIA delays be resolved by agency regulation rather than statute, the Justice Department has said "watch only what we say, not what we do."

It should be obvious that most persons requesting information from the Government are not going to court if their request is not answered within the short time provided in this statute if the agency in a timely manner sets forth reasonable grounds for delaying its response; for example where the records sought are in various locations, where voluminous materials are sought, where some sanitization of files is necessary before release, or where the agency cannot locate the requested materials. In these cases the requestor will inevitably bear with the agency until the records are located, compiled, and a decision is reached as to their release. On the other hand, an agency with records in hand should not be able to use interminable delays to avoid embarrassment, to delay the impact of disclosure, or to wear down and discourage the requestor. Therefore, the time limits set in section 1(c) will mark the exhaustion of administrative remedies allowing lawsuits after a specified period of time, even if the agency has not yet made up its mind.

THE EXEMPTIONS GENERALLY

Many witnesses and earlier proposals to amend the Administrative Procedure Act would make numerous changes in the language of the exceptions contained in section 552(b) of the act. In some cases, agencies would have the language broadened, allowing the withholding of categories of information not now protected under present law to fall outside the language of the exemptions. Some witnesses suggested the elimination of certain exemptions completely. In a majority of cases, the course proposed involved amending the exemptions to adopt current enlightened judicial interpretation of those exemptions.

One proposal, for example, would adopt the distinction made in a number of cases between portions of internal memoranda relating to advice and opinion and those reflecting factual matter. Another would adopt the judicially accepted distinction between investigatory files relating to pending investigations and those relating only to cases closed long ago. The difficulty with fashioning precise language that would lessen rather than increase confusion in interpretation, and the increasing acceptance by courts of public-disclosure oriented interpretations of the exemptions originally intended by Congress, strongly supported my decision not to propose wholesale amendments to the language in the exemptions of the FOIA.

The first extensive commentary on the FOIA by Prof. Kenneth Davis recognized the number of possible ambiguities and inconsistencies within the language of the act and its legislative history. Courts have referred to the lack of clarity of the wording of various exemptions, and one observer has suggested that the House and Senate reports on the Act are so confusing that the act itself must be looked to for congressional intent. Nevertheless, 6 years and some 200 court cases later a full body of case law interpreting the scope and application of the exemptions is available. Furthermore, my own review of that case law has convinced me that courts have by and large settled upon interpretations consistent not only with the spirit of disclosure encompassed by the FOIA, but also with the specific intent of the Congress in enacting that law in 1966. The complexities and difficulties Congress faced in designing the act in 1966 are no less today, and I am satisfied that the results obtained then, as given substance by the judiciary, should stand for now.

EXEMPTION (b)(1)

One single change in the exemption language is proposed, however, which has primarily procedural implications: Subsection (b)(1) is to be changed to except from the application of the disclosure provisions matters that not only are on their face "specifically required by an Executive order—or statute—to be kept secret in the interest of national defense of foreign policy," but also that are in fact found to be within such order or statute. This change responds to the invitation of the Supreme Court in the Mink case for Congress clearly to state its intentions concerning judicial review and in camera inspection of records claimed exempt by virtue of statute or Executive order under section 552(b)(1). I believe that the Court in Mink may have misinterpreted legislative intent, and I would propose to make this intent clear on the act's face.

Before January 23, 1973, it was generally believed that the de novo review [illegible] 552(a)(3) applied to documents withheld under all nine exemptions of the Freedom of Information Act; that is, documents withheld under any exemption could be examined by a court in camera in an FOI case. But on that day the Supreme Court, in Environmental Protection Agency against Mink, ruled 6 to 3 that any classified information withheld under section 552(b)(1) is exempt from disclosure whether or not it is properly or necessarily classified, and the Court further held that courts are not entitled to review the propriety of the agency decision to classify. Given the tremendous abuses of the classification system that have come to light in recent years, the courts should in the least be vested with authority to review security classifications where an agency acted without reasonable grounds in assigning the classification to a particular document. The amendment proposed to section 552(b)(1) is designed to give the courts that authority by examining the documents in light of the Executive order or statute cited to justify withholding.

The Supreme Court indicated that exemption 1 does not permit in camera inspection of withheld documents even to sift out "nonsecret components." The Court then observed:

> Obviously this test was not the only alternative available. But Congress chose to follow the Executive's determination in these matters and that choice must be honored.

Congress should now act to make clear its change of mind on this isue.

Some proposals to amend subsection (b)(1) would require the court to analyze whether the document withheld would, if disclosed, endanger national defense or interfere with foreign policy. Under this approach, any classification of the document under Executive order or statute would be irrelevant. Congress certainly could leave ultimate classification decisions to the courts under only a national defense or foreign policy standard, but I believe it preferable to rely on de novo judicial review of standards set out in Executive orders or statutes.

Under my amendment, a court would make a two-stage determination. First, it would determine whether the withheld document on its face fell within the criteria established by the relevant statute or Executive order. This it would do under Mink. Of course, any document failing this initial test would be disclosable, second, the could would determine—by in camera examination of the document if it deemed such appropriate—whether the material withheld was in fact within the class of material directed to be classified and kept secret under the order or statute. The Government would have to provide adequate evidence and argument to justify to the court the reasonableness of its assertion. But the could would—unlike under present interpretations of the law—be able to overturn unreasonable, arbitrary or capricious classification and order release of the document or nonexempt portions thereof.

REMOVAL OF BASIS FOR WITHHOLDING

A new section is proposed to be added to section 552(b), the thrust of which is congressional insistence on the principle that where one of the reasons for nondisclosure under exemptions (1) and (7) does not apply to a specific case, the information must be disclosed in that specific case.

Let me suggest an example where this provision would apply. Suppose a member of the public requested a file that had been opened in the course of an investigation that had long since been closed. Suppose further that in this file was the name of an informer who provided the Government with a great deal of information on the alleged violator. The proposed amendment would emphasize what is presently understood by courts but unheeded by agencies: it would not be enough for the Government to refuse disclosure of the file merely because it contained the name of an informer. Since in most cases deletion of the informer's name or other identifying characteristic would afford full protection for the informer, there would be no possibility that disclosure of the file could inhibit future informers from providing the Government with information. Thus, under this amendment, the Government could not refuse to disclose the requested records merely because it finds in those records the name of the source of information.

Often agencies may refuse to disclose information not because any current reason exists for withholding that specific information, but because the agency fears that a precedent may thereby be established for a disclosing or similar information where the agency believes that the similar material should not be disclosed. The spirit of this new amendment should also be applied to that situation, so that each case is determined by the agency on its own merits and without fear of implications in future hypothetical cases.

REPORTING REQUIREMENTS; AGENCY DEFINED

Section 3 contains certain reporting provisions designed to facilitate congressional oversight of administration of the Freedom of Information Act, and a new definition of agency for the purposes of that act.

A number of witnesses at our hearings indicated that a primary problem with agency compliance with the FOIA is the absence of significant continuing pressures toward liberal disclosure of information, while the tendency for bureaucratic self-preservation continues strongly to support over-secrecy. Almost all witnesses suggested the importance of congressional oversight in keeping agencies in compliance with the directions of the FOIA. Periodically, but irregularly over the past 6 years the Subcommittee on Administrative Practice and Procedure has asked for reports by agencies on denials of information under the FOIA, and we believe that the mere receipt of an analysis of these reports, providing the occasion for the subcommittee to identify recalcitrant agencies and recurring misinterpretation of the act's mandates can go a long way toward encouraging adherence to the congressional policies that the FOIA reflects. This reporting thus should be regularized. The reporting requirement also suggests a specific role that the Justice Department should play in encouraging agency compliance with the FOIA. A breakdown of cases arising under the act is also required.

Finally, section 3 expands on the definition of agency provided in section 551 (1) of title 5, to assure FOIA application to the Postal Service and the Postal Rate Commission—which indicated to the subcommittee that because of reorganization it did not believe that it would be covered by amendments to the Freedom of Information Act—and also to include publicly funded corporations established under the authority of the United States, like the Public Broadcasting Corporation.

Mr. President, I certainly recognize that these proposed amendments I am offering today will not remedy overnight the numerous abuses occurring under the Freedom of Information Act and the misuses of the withholding provisions in that act. They should, however, facilitate quicker and freer public access to Government information, encourage more faithful compliance with the terms and the spirit of the Freedom of Information Act, and strengthen the citizen's remedy against agencies and officials who violate the act.

When citizens use nursing homes they need to know if they are fire traps. When citizens eat meat they need to know if it was processed under filthy and unsanitary conditions. When citizens buy automobiles they need to know if they have safety defects. When citizens purchase drugs they need to have full and complete information as to their effectiveness and safety. Yet in the past, the Freedom of Information Act has not worked efficiently to bring these kinds of information to public light. The Administrative Practice and Procedure Subcommittee has heard testimony which makes it clear that such basic information as nursing home reports, packing plant warning letters, correspondence regarding automobile defects, and drug safety reports is not being made public. Where information is being disclosed, it is usually only after the person requesting it has gone through lengthy and burdensome bureaucratic procedures and often through protracted litigation. That is why the bill I am introducing is designed to simplify and streamline the procedures of the Freedom of Information Act, so that all Americans can have ready and complete access to information that is supposed to be made public. For the cost of continuing secrecy is not only possible loss of health or life, but can ultimately amount to loss of control of their Government by the American people.

Mr. President, I ask unanimous consent that the text of my bill be printed in the RECORD at this point.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 2543

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the fourth sentence of section 552(a)(2) of title 5, United States Code, is amended by inserting after "copying" the following: "and shall publish quarterly or more frequently, and distribute (by sale or otherwise) copies of".

(b)(1) Section 552(a)(3) of title 5, United States Code, is amended to read as follows:

"(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which reasonably describes such records and which is made in accordance with published rules stating the time, place, fees, and procedures to be followed, shall make the records promptly available to any person.".

(2) Section 552(a) of such title 5 is amended by redesignating paragraph (4) as paragraph (5) and by inserting immediately after paragraph (3) the following new paragraph:

"(4)(A) In order to carry out the provisions of this section, the Director of the Office of Management and Budget shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all agencies. Such fees shall not exceed the average actual direct cost for all agencies of duplication or search. Documents may be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public. But such fees shall ordinarily not be charged whenever—

"(i) the person requesting the records is an indigent individual;

"(ii) such fees would amount, in the aggregate, for a request or series of related requests, to less than $3;

"(iii) the records requested are not found; or

"(iv) the records located are determined by the agency to be exempt from disclosure under subsection (b).

"(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principle place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall consider the case de novo, with such in camera examination of the requested records as it finds appropriate to determine whether such records or any part thereof may be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

"(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within twenty days after the service upon the United States attorney of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

"(D) Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all causes and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

"(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

"(F) Whenever records are ordered by the court to be available under this section, the court shall on motion by the complainant decide whether the act of withholding such rec-

ords was without reasonable basis in law. If the court so decides, the court shall assess a fine of not less than $1,000 nor more than $5,000 against any employee within any agency, or member in the case of a uniformed service, whom the court deems responsible for the withholding of such records.

"(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.".

(c) Section 552(a) of title 5, United States Code, is amended by adding at the end thereof the following new paragraph:

"(6) Each agency, upon any request for records made under paragraph (1), (2), or (3), of this subsection, shall——

"(A) determine within fifteen days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

"(B) make a determination with respect to such appeal within fifteen days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (3) of this subsection.

Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with subparagraph (A) or subparagraph (B) of this paragraph. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of every officer or employee of any agency who participated substantively in the agency's decision to deny such request.".

SEC. 2. (a) Section 552(b)(1) of title 5, United States Code, is amended to read as follows:

"(1) specifically required by an Executive order or statute to be kept secret in the interest of national defense or foreign policy and are in fact covered by such order or statute;".

(b) Section 552(b) of title 5, United States Code, is amended by adding at the end the following: "If the deletion of names or other identifying characteristics of individuals would prevent an inhibition of informers, agents, or other sources of investigatory or intelligence information, then records otherwise exempt under clause (1) and (7) of this subsection, unless exempt for some other reason under this subsection, shall be made available with such deletions.".

SEC. 3. Section 552 of title 5, United States Code, is amended by adding at the end thereof the following new subsections:

"(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Committee on the Judiciary of the Senate and the Committee on Government Operations of the House of Representatives, which shall include—

"(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

"(2) the number of appeals made by persons under subsection (a)(5), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

"(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

"(4) a copy of every rule made by such agency regarding this section;

"(5) the total amount of fees collected by the agency for making records available under this section; and

"(6) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(3)–(F) and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

"(e) For purposes of this section, the term 'agency' means any agency defined in section 551(1) of this title, and in addition includes the United States Postal Service, the Postal Rate Commission, and any other authority of the Government of the United States which is a corporation and which receives any appropriated funds.".

SEC. 4. The amendments made by this Act shall take effect on the ninetieth day beginning after the date of enactment of this Act.

By Mr. HRUSKA (for himself, Mr. BAYH, Mr. COOK, Mr. GURNEY, Mr. HUGH SCOTT, Mr. THURMOND, and Mr. TUNNEY):

S. 2544. A bill to amend the Comprehensive Drug Abuse Prevention and Control Act of 1970 and other laws to discharge obligations under the Convention on Psychotropic Substances relating to regulatory controls on the manufacture, distribution, importation, and exportation of psychotropic substances. Referred to the Committee on the Judiciary.

PSYCHOTROPIC SUBSTANCES ACT OF 1973

Mr. HRUSKA. Mr. President, today, I am introducing a bill for myself and my distinguished colleagues Messrs. BAYH, COOK, GURNEY, HUGH SCOTT, THURMOND, and TUNNEY to amend the Comprehensive Drug Abuse Prevention and Control Act of 1970. This bill would implement the terms of the Convention on Psychotropic Substances which was negotiated in Vienna at an international conference in 1971.

The purpose of this convention is to improve the international control of substances that are not included under any of the existing multilateral drug treaties covering opium and other narcotics. It is designed to govern the so-called psychotropic or mind-altering substances, such as hallucinogens, amphetamines, barbiturates and tranquilizers, and limit the manufacture, distribution and use of these substances to medical and scientific purposes.

Because psychotropic substances are relatively new to both licit and illicit channels, they have never been subjected to similar treaties and regulations. This is an oversight which the United States, in the exercise of its international leadership, sought to cure in the negotiation of the present convention.

President Nixon has asked the Senate to ratify the Convention on Psychotropic Substances and it has been referred to the Senate Committee on Foreign Relations. It is in order that before it receives further consideration there implementing legislation such as contained in this bill should be passed.

The extent of drug abuse throughout the world at the present time is of critical proportion. Hundreds of pounds of deadly drugs are being illegally diverted from international commerce and ending up for sale in the streets of major cities around the globe. Recent reports from the Bureau of Narcotics and Dangerous Drugs and its successor agency, the Drug Enforcement Administration, have made us increasingly aware that the mind-altering drugs present a danger to our society which may equal, or even exceed, that of heroin. It is time, therefore, for the community of nations, including the United States, to remedy this serious problem.

Our Government has long been in a position of leadership in the fight against drug abuse. For example, we have recently proposed to other nations that even stronger measures be taken with regard to the international control of opium and other narcotics. Most of the countries which produce these items are the less-developed nations which do not produce the so-called psychotropic drugs. These psychotropic substances are, however, manufactured in the United States and Europe. It is possible, therefore, that the failure to adequately regulate domestic activity in such drugs will embarrass our efforts to place tighter controls over the production of narcotic crops in these other countries. This is a diplomatic problem which we should not allow to develop.

I shall now describe briefly what the bill itself will do; and of equal importance to many, some things that it will not do.

Nearly all of the requirements which membership in this international convention would impose on the United States are already met by existing laws. Therefore, although the impact of this bill I am introducing today is highly important for international drug control, it will require little change in Federal law.

Under the convention, a special United Nations Commission could place new drugs under international control after receiving scientific and medical advice from the World Health Organization. To implement this, it would be necessary for the United States to impose some minimum controls over the designated drug. This bill would provide mechanisms to insure that the views of the Secretary of Health, Education, and Welfare would be represented in the international body and that only minimum controls would be applied to the drug under our law unless both the Secretary and the Attorney General were to agree to more stringent requirements.

These controls would be limited almost exclusively to international commerce in these substances. For example, in some cases, import and export permits might be required and certain annual reports of

DRAFTS

H. R. 12471

FREEDOM OF INFORMATION ACT AMENDMENTS

I. Provisions of H. R. 12471

a. Overrules Mink

Overrules the Supreme Court decision in the case of Environmental Protection Agency v. Mink 93 S. Ct. 827 (1973), to allow a court to review the contents of any records in camera to determine the sufficiency of an exemption claimed under the Act. Re-worded to permit the court to determine if the criteria for classification was properly applied.

b. Government Given Little Time to Process Requests

An agency must respond to a request within 10 days and make a determination within 20 days thereafter if an appeal is made. The Government must present its case within 20 days if a matter goes to court.

c. Broadens Record

A requester need only reasonably identify a record. Presently a record must be "identifiable."

d. Pays Attorney Fees and Court Costs

e. Requires Agency Reports to Congress on the Disposition of Requests

II. Effective H. R. 12471

The amendments would encourage large numbers of requests levying broad requirements on agencies. Undoubtedly most denial of requests will lead to court action. The Director's statutory responsibility to protect intelligence sources and methods will undoubtedly be challenged.

In sum, H. R. 12471 if enacted into law would result in heavy if not insurmountable administrative burdens to process requests for information. All classification and other holdings would be subject to possible court order forcing disclosure.

DRAFT
26 March 1974

Chairman
Senate Committee

There is now before your Committee, H. R. 12471, amending the Freedom of Information Act, which recently passed the House. Though our views have not been requested, we would appreciate the Committee considering our comments since the CIA and other intelligence agencies cannot continue to protect information vitally affecting the national interest if certain amendments proposed by H. R. 12471 are enacted into law.

Under the bill, Section 552(a)(3) of the Act is amended to provide that the court may examine the contents of any records in camera to determine whether such records, or any parts thereof, shall be withheld under the exemption of classification or any of the other exemptions set forth in subsection (b) of the Act.

The bill rewords Section 552(b)(1), the exemption for classified information, to allow the court to examine the reasonableness of a classification. This change overrules a recent Supreme Court decision, Environmental Protection Agency v. Mink, 93 S. Ct. 827 (1973), which held that the content of Government documents withheld under the exemption in Section 552(b)(1) of the Act is not reviewable by the courts under the de novo requirement in Section 552(a)(3).

The Department of Justice in its report to the House Government Operations Committee on H. R. 12471 strongly opposes the bill, particularly the amendment overruling the Supreme Court decision in the Mink case. The Justice Department considers that the sensitivity of matters of national defense and foreign policy are best judged by the Executive and not the courts. We support this position, particularly as concerns foreign intelligence information involving intelligence sources and methods requiring special protection.

If the Committee, however, deems a court review necessary we would urge that the amendment allow a court to overrule an Executive determination of classification only if the court finds that the determination was "arbitrary and capricious." Admittedly reasonable men differ as to judgment of classification and a court test should not merely substitute the judgment of the court for that of the agency head. The latter's decision should be overturned only if there is a clear misuse of administrative authority. It should also be recognized that in any court test, the complainant need not prove a public interest; whereas, the Government must prove a national interest to assure the continued protection of the information.

We are also concerned that the wording of the amendment in H. R. 12471 concerning court review is ambiguous and can be interpreted

to mean that it is discretionary with the court as to whether or not the review of exempted material is to be conducted in camera or in open court. The concern is supported by the statement on page 8 of the House Committee report on H. R. 12471 "The in camera provision is permissive and not mandatory. It is the intent of the Committee that each court be free to employ whatever means it finds necessary to discharge its responsibilities." Indeed, the whole question becomes moot if in debating the sufficiency of a classification, or the sufficiency of any other of the exemptions under the Act, such information must be disclosed in open court. The court review to determine the sufficiency of any of the exemptions claimed by the Government under the Act must necessarily be conducted in camera in every instance.

Attached is the amendment to Section 552(a)(3) set forth in H. R. 12471 with our suggested added language underlined.

We also support the objections and rationale opposing other provisions of H. R. 12471 raised by the Department of Justice in their report to the House Committee. These provisions are set forth below. If the expanded court review and payment of court costs and attorney fees for claimants become law, requests under the Act undoubtedly will be promoted resulting in a heavy administrative burden. If the below amendments also become law, the administrative burden would be insurmountable. The amendments include:

a. Amending subsection (a)(2) to require the publication and distribution of indexes which now need only be made available for public inspection.

b. Amending subsection (a)(3) to require that requesters need only "reasonably" describe records rather than now having to provide sufficient information so that records are "identifiable."

c. Amending subsection (a) by adding a new paragraph (5) which requires that agencies must respond to a request within ten days and make a determination within twenty days thereafter if the request is denied and appeal is made. Subsection (a)(3) is amended to require the Government to present its case within twenty days after court review is sought.

The Central Intelligence Agency recommends against enactment of this legislation in its present form. We would urge that the Committee consider the above comments and we would strongly request consideration of the attached amendment to the bill.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

W. E. Colby
Director

H. R. 12471 Page 3 Beginning Line 6

(d) The third sentence of section 552(a)(3) of title 5, United States Code, is amended by inserting immediately after "the court shall determine the matter de novo" the following: ", and may examine the contents of any Agency records but only in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b),". Immediately after the third sentence in this section add the following: "The court shall not invalidate a determination by a department or agency that records are to be withheld under the exemption set forth in subsection (b)(1) unless the court determines that the determination was arbitrary and capricious."

INTELLIGENCE SOURCES AND METHODS

"Intelligence Sources and Methods" is defined as that information identifying or relating to sources of foreign intelligence or the methods of collecting and analyzing foreign intelligence. It includes all aspects and techniques of collection, both human and technical, and all aspects of the methodology involved in the analysis of the information collected.

SENATE JUDICIARY COMMITTEE

S. 2543, Amendments to the Freedom of Information Act

Member	Staff Assistant	Contacted
James O. Eastland (D., Miss.)	Peter Stockett	Yes
John L. McClellan (D., Ark.)	Paul Summitt	Yes
Sam J. Ervin, Jr. (D., N. C.)	Bill Persley Larry Baskir	
Philip A. Hart (D., Mich.)	Burt Wides	
Edward M. Kennedy (D., Mass.)	Tom Sussman	
*Birch Bayh (D., Ind.)	Bill Heckman	
Quentin N. Burdik (D., N. Dak.)	Bill Westphal Tom Bergham or Mike Mullen	
✓ *Robert C. Byrd (D., W. Va.)	Tom Hart	
John V. Tunney (D., Cal.)	Jane Frank	
*Roman L. Hruska (R., Neb.)	Doug Marvin	Yes
✓ *Hiram L. Fong (R., Haw.)	Dorothy Parker	
*Hugh Scott (R., Pa.)	Ken Davis	Yes
*Strom Thurmond (R., S. C.)	Stan Hackett Ray Sively	Yes
✓ *Marlow W. Cook (R., Ky.) (3)	Ron Meredith	
✓ *Chas. McC. Mathias (R., Md.) (5)	Quincy Rogers	(phone only)
✓ *Edward J. Gurney (R., Fla.) (4)	Pam Turner	

COURT REVIEW OF RESTRICTED DATA

Under the amendments to the Freedom of Information Act proposed by S. 2543 any person, indeed even a KGB agent, can seek a court review de novo of any Restricted Data for a court determination as to public disclosure should the Atomic Energy Commission refuse on the grounds of security.

Section (B) ii of the bill provides that in security matters the court review is to be conducted by the court only if it is unable to resolve the matter on the basis of affidavits. If the agency head has submitted an affadavit that he personally received the material and judged it to require protection the court is to sustain the Government unless it finds the withholding was without reasonable basis under the criteria exercised.

If Section (B) ii is struck the court can exercise its own criteria and judgment as to the sufficiency of the Atomic Energy Commission's argument to protect Restricted Data. Absent a presumption in its favor, the burden would rest fully with the AEC to prove its case for nondisclosure. This evidentiary burden could require the submission in court of Restricted Data beyond that in question, further broadening the exposure of such sensitive information.

S. 2543, Amendment to the Freedom of Information Act

S. 2543 proposes several amendments to the Freedom of Information Act (title 5, section 552) to require agencies to be more responsive to demands for information under the Act. The bill among other things would expand the court review of agency decisions to deny information under the exemptions provided for in the Act.

Section 552(a)(3) of the Act provides for de novo court review of any agency's refusal to grant access to information. A recent Supreme Court case, Environmental Protection Agency v. Mink, 93 S. Ct. 827 (1973), held that the court review provision did not allow the court to examine in detail information which an agency, in that case the Atomic Energy Commission, claimed was classified and specifically exempt under the exemptions provided in section 552(b). That section specifically exempts nine categories of information, classified information being the first. S. 2543 amends the court review section to provide that the court may examine the content of any records in camera to determine whether such records, or any parts thereof, shall be withheld under any of the exemptions in the Act.

The Government's foreign intelligence effort is dependent upon productive intelligence sources and effective methods of collection and analysis. If they are jeopardized, that effort would be critically affected.

The sensitivity and need for protection of Intelligence Sources and Methods was recognized by the Congress in Section 102(d)(3) of the National Security Act of 1947, as amended (50 U.S.C.A. 403), and in section 6 of the Central Intelligence Act of 1949 (50 U.S.C.A. 403g). The National Security Act provides:

> " ... That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure."

Unfortunately, the Central Intelligence Agency is in a dilemma to prove sensitivity to justify classification to the satisfaction of a court. To prove its case, the Agency must disclose considerably more information beyond that in question. Whether or not successful, sensitive information would have to be revealed. The impact of S. 2543 would gravely affect the operations of the Central Intelligence Agency and other agencies engaged in collecting foreign intelligence information. Foreign sources, including foreign governments, would hardly cooperate in matters of confidence with the U. S. Government if the degree of protection to be afforded must continually meet the test of a legal argument.

Information related to and involving Intelligence Sources and Methods must be excluded from a detailed in camera court review provided by S. 2543. The statutory protection provided this information should constitute a

basis for ~~this exclusion~~. Among the exemptions provided for in the Act, section 552(b)(3) specifically excludes matters that are "specifically exempted from disclosure by statute."

Restricted Data (42 U.S.C. 2162) and Communications Intelligence (18 U.S.C. 798) are other categories of information which like Intelligence Sources and Methods require protection by statute. These categories of information are all in effect "born classified." The House report by the Government Operations Committee (93-876) on H.R. 12471, a bill proposing substantially the same amendments as S. 2543, including overruling the Mink case, recognized the distinction between information protected by statute and information specifically required by Executive Order to be kept secret. The report commented (page 8) as follows:

> "Even with the broader language of these amendments as they apply to exemption (b)(1), information may still be protected under the exemption of 552(b)(3): "specifically exempted from disclosure by statute." This would be the case, for example, with the Atomic Energy Act of 1954, as amended. It features the "born classified" concept. This means that there is no administrative discretion to classify, if information is defined as "restricted data" under that Act, but only to declassify such data."

Attached is a proposed amendment which would exclude Intelligence Sources and Methods, Restricted Data, and Communications Intelligence from the in camera court review provided for in S. 2543 (Committee Print).

The Central Intelligence Agency was established to meet vital national intelligence needs; however, like all other Federal agencies, the records of the Central Intelligence Agency are subject to the Freedom of Information Act. Rules and regulations for the benefit of the public are promulgated in the Federal Register. Most of the information in the Agency is classified and is exempted from public inspection by the very terms of the Freedom of Information Act. The Congress, by law, has vested in the Director of Central Intelligence the determination as to what constitutes Intelligence Sources and Methods and other classified foreign intelligence information. ~~If S. 2543~~ this statutory responsibility cannot be is enacted in its present form it would derogated the ~~statutory~~ responsibility ~~and subject~~ and subject the determination made thereunder to a detailed Court ~~an external~~ examination on a claim by any person, including one who is not a U. S. citizen.

AMENDMENT TO S. 2543 (Committee Print, January 29, 1974)

The added language is underlined and would be inserted at line 16, page 3:

"(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall consider the case de novo, with, except for matters withheld under section 552(b)(3), involving, but not limited to, Restricted Data, intelligence sources and methods, and communication intelligence under sections 2162 of Title 42, 403(d)(3) and 403g of Title 50, 798 of Title 18 and 73 Stat. 64, such in camera examination of the requested records as it finds appropriate to determine whether such records or any part thereof may be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

under section 102 (d)(3) of the National Security Act of 1947 (50 USCA 403)

In amending sections (a)(3) and (b)(1) of the Act, the Committee recognizes the concern of the Director of Central Intelligence that ~~not all~~ foreign intelligence information involving Intelligence Sources and Methods ~~meets the~~ criteria of "national defense or foreign policy" ~~for protection~~. The basis for protecting Intelligence Sources and Methods is the broader statutory responsibility of the Director of Central Intelligence under section 102(d)(3) of the National Security Act of 1947, (50 U.S.C.A. 403). The court, in its review of foreign intelligence information involving Intelligence Sources and Methods withheld under section (b)(1) as proposed by the bill, should take cognizance of this statutory protection and inherent sensitivity. The court should not necessarily apply a rigid test of the criteria of protection as set forth in Executive Order 11652, "Classification and Declassification of National Security Information and Material."

AMENDMENT TO S. 2543 (Committee Print, January 29, 1974)

The added language is underlined and would be inserted at line 16, page 3:

"(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall consider the case de novo, with, except for matters withheld under section 552(b)(3), involving, but not limited to, Restricted Data, intelligence sources and methods, and communication intelligence under sections 2162 of Title 42, 403(d)(3) and 403g of Title 50, 798 of Title 18 and 73 Stat. 64, such in camera examination of the requested records as it finds appropriate to determine whether such records or any part thereof may be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

MORANDUM FOR: S. 2543

Various undated notes on FOI

(DATE)

FORM NO. 101 REPLACES FORM 10-101
1 AUG 54 WHICH MAY BE USED. (47)

The Central Intelligence Agency

S. 2543

In amending sections (a)(3) and (b)(1) of the Act, the Committee recognizes the concern of the Director of Central Intelligence that not all foreign intelligence information involving Intelligence Sources and Methods meets the criteria of "national defense or foreign policy" for protection. The Committee also recognizes that the basis for protecting Intelligence Sources and Methods is the broader statutory responsibility of the Director of Central Intelligence under section 102(d)(3) of the National Security Act of 1947, (50 U.S.C.A. 403). The court, in its review of foreign intelligence information involving Intelligence Sources and Methods withheld under section (b)(1) as proposed by the bill, need to should take cognizance of this statutory protection and inherent sensitivity. The court should not necessarily apply a rigid test of the criteria of protection as set forth in Executive Order 11652, "Classification and Declassification of National Security Information and Material."

The Central Intelligence Agency strongly urged that the Committee exempt from the court review provisions of S. 2543 certain special categories of scientific information - Restricted Data (42 U.S.C.A. 2162) Communications Intelligence (18 U.S.C.A. 798) and Intelligence Sources and Methods (50 U.S.C.A. (d)(3) and (g)) which are recognized by statute as deserving of special protection from unauthorized disclosure. The Agency noted that these categories of information are presently protected under the exemptions in Section 552(b)(3) "specifically exempted from disclosure by statute" as well as exemption (b)(1) of the Freedom of Information Act. The believes that the categories of information will be adequately protected under S. 2543. If any court subjects such information to court review, it is expected the review would be conducted in camera under the procedures established in the bill for information exempt under Section 552(b)(1). The court will also recognize the inherent sensitivity of such information and not apply rigidly the test of protection as set forth in Executive Order 11652, "Classification and Declassification of National Security Information and Material."

By statute

Certain special categories of sensitive information - Restricted Data (42 U.S.C.A. 2162), Communication Intelligence (18 U.S.C.A. 798), and Intelligence Sources and Methods (50 U.S.C.A. 403 (d)(3) and (g)) are recognized by statute as ~~deserving of~~ given special protection from unauthorized disclosure. These categories of information have been exempted from public inspection under Section 552(b)(3), "specifically exempted from disclosure by statute" and (b)(1), "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." The Committee believes that these categories of information will be adequately protected under S. 2543. If such information is ever subject to court review, ~~it is expected~~ the review will be conducted in camera under the procedures established in the bill for information exempt under Section 552(b)(1). It is also expected that in such cases the court will recognize that such information is inherently sensitive and that the latitude for discretion permitted under Executive Order 11652 does not apply to such information.

S. 2543, Amendment to the Freedom of Information Act

S. 2543 proposes several amendments to the Freedom of Information Act (title 5, section 552) to require agencies to be more responsive to demands for information under the Act. The bill among other things would expand the court review of agency decisions to deny information under the exemptions provided for in the Act.

Section 552(a)(3) of the Act provides for de novo court review of any agency's refusal to grant access to information. A recent Supreme Court case, Environmental Protection Agency v. Mink, 93 S. Ct. 827 (1973), held that the court review provision did not allow the court to examine in detail information which an agency, in that case the Atomic Energy Commission, claimed was classified and specifically exempt under the exemptions provided in section 552(b). That section specifically exempts nine categories of information, classified information being the first. S. 2543 amends the court review section to provide that the court may examine the content of any records in camera to determine whether such records, or any parts thereof, shall be withheld under any of the exemptions in the Act.

The Government's foreign intelligence effort is dependent upon productive intelligence sources and effective methods of collection and analysis. If they are jeopardized, that effort would be critically affected.

The sensitivity and need for protection of Intelligence Sources and Methods was recognized by the Congress in Section 102(d)(3) of the National Security Act of 1947, as amended (50 U.S.C.A. 403), and in section 6 of the Central Intelligence Act of 1949 (50 U.S.C.A. 403g). The National Security Act provides:

> " ... That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure."

Unfortunately, the Central Intelligence Agency is in a dilemma to prove sensitivity to justify classification to the satisfaction of a court. To prove its case, the Agency must disclose considerably more information beyond that in question. Whether or not successful, sensitive information would have to be revealed. The impact of S. 2543 would gravely affect the operations of the Central Intelligence Agency and other agencies engaged in collecting foreign intelligence information. Foreign sources, including foreign governments, would hardly cooperate in matters of confidence with the U. S. Government if the degree of protection to be afforded must continually meet the test of a legal argument.

Information related to and involving Intelligence Sources and Methods must be excluded from the in camera court review provided by S. 2543. The statutory protection provided this information should constitute a

basis for this exclusion. Among the exemptions provided for in the Act, section 552(b)(3) specifically excludes matters that are "specifically exempted from disclosure by statute."

Restricted Data (42 U.S.C. 2162) and Communications Intelligence (18 U.S.C. 798) are other categories of information which like Intelligence Sources and Methods require protection by statute. These categories of information are all in effect "born classified." The House report by the Government Operations Committee (93-876) on H.R. 12471, a bill proposing substantially the same amendments as S. 2543, including overruling the Mink case, recognized the distinction between information protected by statute and information specifically required by Executive Order to be kept secret. The report commented (page 8) as follows:

> "Even with the broader language of these amendments as they apply to exemption (b)(1), information may still be protected under the exemption of 552(b)(3): "specifically exempted from disclosure by statute." This would be the case, for example, with the Atomic Energy Act of 1954, as amended. It features the "born classified" concept. This means that there is no administrative discretion to classify, if information is defined as "restricted data" under that Act, but only to declassify such data."

Attached is a proposed amendment which would exclude Intelligence Sources and Methods, Restricted Data, and Communications Intelligence from the in camera court review provided for in S. 2543 (Committee Print).

The Central Intelligence Agency was established to meet vital national intelligence needs; however, like all other Federal agencies, the records of the Central Intelligence Agency are subject to the Freedom of Information Act. Rules and regulations for the benefit of the public are promulgated in the Federal Register. Most of the information in the Agency is classified and is exempted from public inspection by the very terms of the Freedom of Information Act. The Congress, by law, has vested in the Director of Central Intelligence the determination as to what constitutes Intelligence Sources and Methods and other classified foreign intelligence information. If S. 2543 is enacted in its present form it would derogate the statutory responsibility and subject the determination made thereunder to an external examination on a claim by any person, including one who is not a U. S. citizen.

AMENDMENT TO S. 2543 (Committee Print, January 29, 1974)

The added language is underlined and would be inserted at line 16, page 3:

"(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall consider the case de novo, with, except for matters withheld under section 552(b)(3), involving, but not limited to, Restricted Data, intelligence sources and methods, and communication intelligence under sections 2162 of Title 42, 403(d)(3) and 403g of Title 50, 798 of Title 18 and 73 Stat. 64, such in camera examination of the requested records as it finds appropriate to determine whether such records or any part thereof may be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

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